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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS MICHAEL COBB,

Defendant and Appellant.

C080697

(Super. Ct. Nos. CRF131213,
CRF131290)

After violating probation, the trial court found defendant Dennis Michael Cobb was ineligible for treatment under Penal Code section 1170.9¹ because his offenses were not committed due to substance abuse or mental health problems suffered as a result of his military service. On appeal, defendant contends the trial court abused its discretion in finding him ineligible. We conclude there was no abuse of discretion and affirm the judgment.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL HISTORY

On March 21, 2013, defendant Dennis Michael Cobb punched the victim with enough force to cause a comminuted nasal fracture and significant bruising to his face. In case No. CRF131213, defendant entered a negotiated plea of no contest to battery causing serious bodily injury (Pen. Code, § 243, subd. (d)) and admitted he personally inflicted great bodily injury on someone other than an accomplice, making the offense a strike prior. On May 20, 2013, defendant punched a cohabitant in the face multiple times, causing a laceration below her left eye and bruising around her eyes. In case No. CRF131290, defendant entered a negotiated plea of no contest to infliction of corporal injury upon a cohabitant (Susan Stegall) (§ 273.5, subd. (a)) in exchange for dismissal of the remaining count (misdemeanor battery on Laura Harris) with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. Defendant entered his pleas in exchange for no state prison at the outset and a year in custody for each case to run concurrently as a condition of probation.

On July 1, 2013, the trial court suspended imposition of sentence and granted defendant probation for five years in each case.

Six months later, defendant admitted he violated probation in each case by violating a no-contact order (he contacted Susan Stegall, the victim in case No. CRF131290) in exchange for dismissal of a new case (case No. CRF132846). Probation was reinstated in each case with 176 days in custody with credit for time served.

In August 2015, defendant admitted violating probation by failing to report to his probation officer beginning in December 2014 (petition filed March 2015) in exchange for concurrent sentencing.

Trial Court Proceedings on Defendant's Eligibility under Section 1170.9

Upon the parties' request, the trial court ordered a supplemental probation report on defendant's eligibility for treatment under section 1170.9.² Defendant served in the United States Army from May 1981 to May 1984.

The probation officer filed a supplemental report, stating none of defendant's records reflected he suffered from a mental health condition until 2013 and none showed a mental health condition as a result of his military service. The probation officer spoke with Kimberly Higgins, a caseworker with the Department of Veterans Affairs (VA), who stated defendant was not a suitable candidate for treatment under section 1170.9 since he had a substance abuse problem prior to enlisting in the military and repeatedly failed to follow through with VA's attempts to arrange for treatment. Based on a review

² Section 1170.9 provides, in pertinent part, as follows:

“(a) In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service. The court may request, through existing resources, an assessment to aid in that determination.

“(b) (1) If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation, the court shall consider the circumstances described in subdivision (a) as a factor in favor of granting probation.

“(2) If the court places the defendant on probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that period which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists.”

of defendant's medical records, Higgins declared in a letter to the court that defendant did not have a service connected disability and his history of substance abuse predated his military service.

Defendant began drinking alcohol at 15 or 16 years of age and still abuses alcohol. Defendant began using amphetamines at 15 years of age, stopped when he enlisted in the military, and began using them again after his discharge. Defendant began using heroin at 18 years of age while in the military. Defendant had been diagnosed with alcohol abuse and dependence, and general anxiety disorder. In 2009, he was also diagnosed with opioid abuse and amphetamine abuse in remission. He failed to obtain residential treatment and refused referrals for detox, VA treatment, and homeless veteran services. In 2012, defendant again refused substance abuse treatment. In 2013, he reported that he starting using methamphetamine. In 2014, although he filled out the paperwork, he did not participate in any VA substance abuse treatment. In 2015, he claimed to have been in residential treatment for two months but, if so, the VA has no documentation of any such treatment.

Higgins stated defendant was eligible to participate in VA treatment services. In order for defendant to participate in VA treatment services, he had to complete an updated substance abuse and mental health assessment and then be evaluated to determine whether he should receive residential or outpatient care.

On August 27, 2015, while in custody awaiting sentencing, defendant "self-referred" to the jail's mental health services. He attended seven counseling sessions to discuss drug and alcohol abuse and skills for coping with emotions.

Defense counsel sought reinstatement of probation and treatment under section 1170.9. The prosecutor opposed both, arguing defendant's diagnoses and disorders are not linked to his military service and any additional attempts at treatment would fail.

Trial Court's Ruling

At sentencing, the trial court stated it had reviewed the supplemental probation report and Higgins's letter and invited argument. The trial court ruled as follows:

“[Defendant], the whole reason behind [section] 1170.9 is to consider and to provide services to somebody who is in need of help as a result of their service to the country and problems that they have that are attributable to service to the country.

“It was not originally designed to provide services to people who have lots of problems who also happen to have been veterans. There has to be a link, otherwise they would be providing services to a whole lot of people. I am sure they do provide services to many people, but I would prefer them to provide services to the people for whom the statute was originally designed and for people who are going to take advantage of those services too; otherwise we are wasting services on some people and not providing services to others.

“[Defendant], based upon what I have read including the September 9th letter [from Higgins] and including your prior probation report and including the supplemental report, the Court just does not believe that you are the type of person contemplated in [section] 1170.9. There is no service-connected disability according to the [VA]. The problems that you had predate your entry into the military and some of them, at least, many efforts were made to provide you services both with the Veteran's association, even though they were not obligated to do so, and by the probation department. The Court just does not find that you are eligible under [section] 1170.9 nor does the Court find that you are an appropriate candidate for reinstatement on probation.”

The trial court found defendant was ineligible for treatment under section 1170.9, denied continued probation, and sentenced him to state prison for four years in each case with the terms to run concurrently.

Defendant appeals. The court granted a certificate of probable cause. (§ 1237.5.)

DISCUSSION

Defendant contends the trial court abused its discretion in finding he was ineligible for treatment under section 1170.9. We conclude there was no abuse of discretion.

Section 1170.9 provides a trial court, in its discretion, with alternative sentencing for a veteran who claims he or she committed his or her offense due to sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems suffered as a result of his or her military service. To come within section 1170.9, the following conditions must be satisfied: (1) the defendant must have been a member of the United States military; (2) the defendant must suffer from sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems as a result of that military service; (3) the defendant must be eligible for probation; (4) the court must grant the defendant probation; (5) there must be an appropriate local, state, federal, or private nonprofit program that can treat the defendant; and (6) the defendant must agree to participate in that program. (§ 1170.9, subs. (a) & (b); see *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1089.) If those conditions are met, the trial court then has discretion to order the defendant into the treatment program for a period not to exceed that he would have served in prison or county jail. (§ 1170.9, subd. (b)(2); *Ferguson*, at p. 1089.) A trial court's denial of probation and treatment under section 1170.9 is reviewed for abuse of discretion. (*Ferguson*, at pp. 1091-1092.)

Here, the trial court relied upon information in the supplemental probation report and the letter from a caseworker with the VA who had reviewed defendant's medical records. The caseworker stated defendant did not have a service connected disability and defendant's substance abuse problems were not a result of his military service. Based on defendant's issues prior to his enlistment into the military, tendency to relapse with alcohol, and his failure to follow through on VA treatment programs, the probation department did not recommend alternative treatment under section 1170.9.

Defendant argues his substance abuse problems were “exacerbated” by his military service, noting his alcohol abuse affected his rank and pay and he acquired a heroin addiction. The trial court did not abuse its discretion in finding defendant’s substance abuse problems are not a result of his military service. Defendant’s substance abuse problems began before his military service. He began abusing alcohol at the age of 15 or 16 years. He continued his abuse of alcohol in the military. He still abuses alcohol. He used other substances as well, before, during, and after service.

Defendant argues Higgins’s letter is “weak support” for the conclusion his problems were not service-connected, noting Higgins stated defendant is eligible to participate in VA treatment services. While defendant may be eligible for VA treatment services (in which he has repeatedly refused to participate), that is not the same as the required finding under section 1170.9, that is, defendant suffers from substance abuse as a result of his military service.

Finally, we reject defendant’s argument the trial court erroneously denied section 1170.9 treatment based on defendant’s “apparent lack of combat service.” As support, defendant points to the trial court’s statement that “I am sure the [VA] do provide services to many people, but I would prefer them to provide services to the people for whom the statute was originally designed and for people who are going to take advantage of those services too” Defendant is misinterpreting the trial court’s statement and taking words out of context. The trial court’s reference, in context, to section 1170.9 as “originally designed” meant the purpose was to provide services to military service members who needed help due to problems caused by military service and not to people who have problems unrelated to service.³

³ As originally enacted, section 1170.9 applied to Vietnam combat veterans. (Stats. 1982, ch. 964, § 1, p. 3466 [originally enacted as § 1170.8, renumbered later to § 1170.9].) Section 1170.9 was subsequently amended to apply to all members of

We conclude the trial court did not abuse its discretion in denying treatment under section 1170.9.

DISPOSITION

The judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
HULL, Acting P. J.

_____/s/
ROBIE, J.

the military who served in combat. (Stats. 2006, ch. 788, § 2, pp. 6289-6290.) In 2011, section 1170.9 was amended to apply to all military veterans. (Stats. 2010, ch. 347, § 1.)